PREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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OCTOBER TERM, 1970

No. [redacted] 219

UNITED MINE WORKERS OF AMERICA,
Petitioner,
v.
TENNESSEE PRODUCTS & CHEMICAL CORPORATION and NATIONAL LABOR RELATIONS BOARD,
Respondents.

UNITED MINE WORKERS OF AMERICA,
Petitioner,
v.
BASHAM COAL COMPANY, CATES COAL COMPANY, MARSHALL MEEKS d/b/a CHERRY COAL COMPANY NO. 15, JAMES CAMPBELL COAL COMPANY, Formerly CLEAR CREEK COAL COMPANY, COAL CREEK COAL COMPANY, CARDELL COAL COMPANY, CUNNINGHAM BROTHERS COAL COMPANY, O. L. ELLIS COAL COMPANY, WILLIS FLYNN COAL COMPANY, HUBERT FULTZ COAL COMPANY, GOODSPRING COAL COMPANY, GRUNDY MINING COMPANY, HOWARD HIGGINS and/or AUSTIN MATTHEWS d/b/a HICKORY COAL COMPANY, HOWARD HIGGINS COAL COMPANY, C. P. HUNZICKER COAL COMPANY, FRANK HUNZICKER COAL COMPANY, ALTON JOHNSON COAL COMPANY, KELLY CREEK COAL COMPANY, ALTON JOHNSON d/b/a MAPLE COAL COMPANY, MARTIN COAL COMPANY, MARSHALL MEEKS COAL COMPANY, 9TH WEST COAL COMPANY, NORTH END COAL COMPANY, LEON NUNLEY COAL COMPANY, EARL PATTON d/b/a HUBERT FULTZ COAL COMPANY, J. R. PATTON COAL COMPANY, LEON PATTON COAL COMPANY, M. A. PAYNE, INC., H. WILLIS FLYNN d/b/a POPLAR COAL COMPANY, JOSEPH H. GRAHAM d/b/a PINE COAL COMPANY, R & S COAL COMPANY, J. W. SANDERS COAL COMPANY, STEPHENSON BROTHERS COAL COMPANY, INC., ALTON JOHNSON d/b/a SPRUCE COAL COMPANY, SYCAMORE COAL COMPANY, TENNESSEE CONSOLIDATED COAL COMPANY, TRACY CITY COAL COMPANY, VIRGIL THOMAS COAL COMPANY, TRUSSELL COAL COMPANY, WALNUT COAL COMPANY and NATIONAL LABOR RELATIONS BOARD,
Respondents.

BRIEF

In Opposition to the Petition for Writ of Certiorari

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1650

UNITED MINE WORKERS OF AMERICA,
Petitioner,
v.
TENNESSEE PRODUCTS & CHEMICAL CORPORATION and NATIONAL LABOR RELATIONS BOARD,
Respondents.

UNITED MINE WORKERS OF AMERICA,
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v.
BASHAM COAL COMPANY, CATES COAL COMPANY, MARSHALL MEEKS d/b/a CHERRY COAL COMPANY NO. 15, JAMES CAMPBELL COAL COMPANY, Formerly CLEAR CREEK COAL COMPANY, COAL CREEK COAL COMPANY, CARDELL COAL COMPANY, CUNNINGHAM BROTHERS COAL COMPANY, O. L. ELLIS COAL COMPANY, WILLIS FLYNN COAL COMPANY, HUBERT FULTZ COAL COMPANY, GOODSPRING COAL COMPANY, GRUNDY MINING COMPANY, HOWARD HIGGINS and/or AUSTIN MATTHEWS d/b/a HICKORY COAL COMPANY, HOWARD HIGGINS COAL COMPANY, C. P. HUNZICKER COAL COMPANY, FRANK HUNZICKER COAL COMPANY, ALTON JOHNSON COAL COMPANY, KELLY CREEK COAL COMPANY, ALTON JOHNSON d/b/a MAPLE COAL COMPANY, MARTIN COAL COMPANY, MARSHALL MEEKS COAL COMPANY, 9TH WEST COAL COMPANY, NORTH END COAL COMPANY, LEON NUNLEY COAL COMPANY, EARL PATTON d/b/a HUBERT FULTZ COAL COMPANY, J. R. PATTON COAL COMPANY, LEON PATTON COAL COMPANY, M. A. PAYNE, INC., H. WILLIS FLYNN d/b/a POPLAR COAL COMPANY, JOSEPH H. GRAHAM d/b/a PINE COAL COMPANY, R & S COAL COMPANY, J. W. SANDERS COAL COMPANY, STEPHENSON BROTHERS COAL COMPANY, INC., ALTON JOHNSON d/b/a SPRUCE COAL COMPANY, SYCAMORE COAL COMPANY, TENNESSEE CONSOLIDATED COAL COMPANY, TRACY CITY COAL COMPANY, VIRGIL THOMAS COAL COMPANY, TRUSSELL COAL COMPANY, WALNUT COAL COMPANY and NATIONAL LABOR RELATIONS BOARD,
Respondents.

BRIEF

For all Respondents except Cardell Coal Company, Tennessee Products Company and the National Labor Relations Board in opposition to Petition of the United Mine Workers of America for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

To the Honorable, The Chief Justice and the Associate Justices of The Supreme Court of the United States:

This brief is filed on behalf of all respondents herein except Cardell Coal Company, Tennessee Products Company and the National Labor Relations Board (hereafter referred to as respondents) in opposition to the Petition for Writ of Certiorari filed in this cause by the United Mine Workers of America, said Petition having been filed to review the judgment of the United States Court of Appeals for the Sixth Circuit entered March 5, 1970 in National Labor Relations Board vs. Basham Coal Company, et al, No. 18463 wherein the Sixth Circuit denied enforcement to a bargaining order of the National Labor Relations Board.

OPINION BELOW

The opinion of the Sixth Circuit is officially reported at 423 F.2d (1970) and is reprinted in its entirety in Appendix A of petitioner's brief. The opinion and order of the National Labor Relations Board, hereinafter referred to as the Board, is officially reported at 167 NLRB 12 and is reprinted in Appendix B of petitioner's brief. The Report of the National Labor Relations Board Investigation by the Regional Director is reprinted in Appendix A of respondents' brief.

QUESTIONS PRESENTED

Respondents do not accept the questions proposed by the United Mine Workers

and propose instead the following questions:

1. Did the Sixth Circuit err in holding that under unusual circumstances employers could withdraw from a multi-employer bargaining unit without the consent of the Union?

2. Did the Sixth Circuit err when it held that where the National Labor Relations Board had enunciated a per se rule as to withdrawal of employers from a multi-employer bargaining unit after the start of negotiations, the Board exceeded its statutory authority and its decision based upon such a rule was so arbitrary as to require the Appellate Court to apply the proper legal standard?

3. Did the Sixth Circuit properly find that the alleged violations of Section 8(a) 1 and 2 of the Act were barred by the six months statute of limitations of Section 10(b) of the National Labor Relations Act?

STATUTE INVOLVED

The statute here under consideration is the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 et seq.)

STATEMENT OF FACTS

BACKGROUND

This case arises out of the labor strife and economic conditions which have beset southeast Tennessee coal fields since 1960. The locus of the dispute is the Tennessee

counties of Grundy, Marion and Sequatchie.

From about 1950 to 1958, Products and Tennessee Consolidated Coal Company (hereinafter referred to as Consolidated) recognized and bargained with the UMW as the representative of their employees engaged in the mining of coal in the Southeast Tennessee area. Prior to February 1963, Consolidated and Products were the dominant interests in this area, both firms having actively operated coal mines in their own behalf and/or having leased portions of coal fields which they controlled to various independent operator-lessees and sub-lessees (J.A.15a)[1] However, by February of 1963, neither Consolidated nor Products had any employees in the area and both had completely terminated all mining operations except those which may be imputed to Consolidated through the activities of its subsidiary Grundy Mining

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[1] "J.A." references are to portions of the record printed in the Joint Appendix used in the Sixth Circuit. References to the transcript of testimony in all proceedings are designated as "Tr". Reference to the first representation proceeding would be indicated by "RI". Reference to the second representation proceedings are indicated by "RII" and unfair labor practice proceeding are "RIII". Reference to the exhibits in such proceedings are designated as follows: General Counsel's Exhibits - "GCX"; Tennessee Products Exhibits - "PX"; Sewanee's Exhibits - "SX".

Company (hereafter referred to as Grundy) and have not resumed operations since (J.A. 37a).

On March 15, 1960, Consolidated terminated its contract with the United Mine Workers and closed down its Coal Valley Mine (RI. Tr. 1-10). In May of 1961, Consolidated entered into a contract with Allen and Garcia, a coal mine management organization, to reopen the Coal Valley Mine (RI.Tr. 1-12). When Allen and Garcia took over the operation of the Coal Valley Mine, they entered into a contract with the UMW covering this mine (RI. Tr. 1-14). In June of 1962, the Coal Valley Mine was closed and the mine known as Gray's Creek No. 11 mine was started (RI. Tr. 1-17). In August, 1962, Allen and Garcia gave the UMW sixty days notice of termination of its contract with them. The termination date was October 24, 1962. On October 10, 1962, Allen and Garcia ceased operation of the mines, and Grundy Mining Company took over as operator (RI. Tr. 118, 121-1221). Products ceased all mining operations in its own behalf on January 31, 1962, completed all recovery work on its mines by February 28, 1962, and officially closed its mines as of March 1, 1962. By February of 1963, Products had terminated its three remaining tipple employees due to its inability to purchase coal and meet certain contract obligations (RI. Tr. page 88, line 7).

Since the record is completely barren of any operations by Consolidated after the termination of its operations through Allen and Garcia on October 10, 1962, and

since Products had ceased all mining operations and had terminated all employees as of February, 1963, it is clear that neither Consolidated nor Products engaged in coal mining operations since February of 1963.

From about 1950 to August of 1958, Products, Consolidated, and Whitwell Coal Company (hereinafter referred to as Whitwell) had engaged in multi-employer bargaining with UMW through an organization known as the Southern Tennessee Coal Producers Association which was composed of Products, Consolidated, and Whitwell. A series of contracts were negotiated, the last of which was executed in 1958 and terminated in 1962. The practice during this period was that after a contract had been negotiated between Southern Tennessee Coal Producers Association and the UMW, the small operators in the area would sign a separate contract with the UMW (RI. Tr. 136). This contract was a printed contract, identical to that negotiated between the Southern Tennessee Coal Producers Association and the UMW. By the Fall of 1962, the only contract in effect between the UMW and any operators in the area was that between the UMW and Allen and Garcia covering Coal Valley Mine which, as has been previously seen, was closed at that time (RI. Tr. 114).

In September of 1962, the UMW filed a petition for an election among the employees of the Gray's Creek No. 11 Mine in Palmer, Tennessee, naming Allen and Garcia employer (RI. Tr. 118-119). This petition was amended on or about October 15, 1962, naming Grundy Mining Company as the em-

ployer at the Gray's Creek No. 11 Mine (RI. Tr. 122). This petition was an entirely separate transaction from any negotiations which occurred between the UMW and Sewanee Coal Operators Association (hereafter referred to as Sewanee).

Sewanee was formed on October 2, 1962. The first bargaining session between Sewanee and the UMW was held in the Fall of 1962. At the first session, the UMW was advised that Grundy, Consolidated, and Products were not members of Sewanee for bargaining purposes and that they would not be bound by any contracts negotiated between Sewanee and the UMW until there had been an election among their employees and a certification of the UMW as the bargaining representative of their employees (RI. Tr. 138 et seq.; p. 219-220).

Between October, 1962 and January, 1963 there was a series of four meetings between the UMW and Sewanee at which attempts were made to negotiate a new collective bargaining agreement covering the southeast Tennessee coal fields (J.A. 16a). The respondents were and are presently unable to meet the terms of the National Bituminous Coal Wage Agreement of 1950 as amended (hereafter referred to as N.B.C.W.A.) offered by the UMW which were, effectually, the only terms to which the UMW would agree (Ramsey v. UMWA., 265 F. Supp. 388, 430). The N.B.C.W.A. had previously been negotiated between the UMW and the Bituminous Coal Operators of America (hereafter referred to as B.C.O.A.).

The negotiations between Sewanee and the UMW broke down on December 26, 1962, and the UMW called a strike throughout the coal fields resulting in the closing down of all operations in the area. This strike has continued (RIII. Tr. 67). On February 23, 1963, the United Mine Workers filed the first of a series of representation petitions which culminated in the unfair labor practice case presently under consideration (J.A. 34a).

Since 1960, these coal fields have been the scene of continued violence, threats, and intimidation perpetrated by the representatives of the UMW against the non-union employees. See Gibbs v. United Mine Workers of America, 343 F. 2d 609 (C.A. 6), 612 through 614. In Local 5881, United Mine Workers of America and Grundy Mining Company, Case No. 10-CB-1225, the Local was ordered to cease and desist from the use of violence against Grundy employees, which order was enforced by the Sixth Circuit in the case of NLRB v. Local 5881, United Mine Workers of America, 296 F. 2d 734 (C.A. 6, 1961). On the day after the December 26, 1962 strike was called, further violence by the UMW resulted in a citation of Local 5881 for contempt of Court in NLRB v. Local 5881, United Mine Workers of America, No. 1468, in the United States Court of Appeals for the Sixth Circuit. As a result of the contempt citation, the Honorable Leslie Darr, United States District Judge for the Eastern District of Tennessee, Southern Division, sitting as special master, recommended fines to Waldon Shrum, President of Local 5881

James Fults, Vice President of Local 5881, and against Local 5881, UMW. The findings of Judge Darr, sitting as special master, were affirmed in NLRB v. Local 5881, United Mine Workers of America, 323 F. 2d 853 (1963, C.A. 6). Additionally, a cease and desist order was recommended by the trial examiner in July 1963 against Local 7083 and District 19 of the UMW because of the UMW's violence. The trial examiner's findings were adopted by the Board at 146 NLRB 20. In May of 1963, Local 7083 of the UMW engaged in further violence against employees of Grundy Mining Company. Local 7244 of the UMW attempted, by violence, to prevent the Grundy employees from organizing and electing officers of a Local of the Southern Labor Union. The UMW was again found guilty of violating the National Labor Relations Act as reported in 146 NLRB 29 (see Appendix A of respondents' brief, P. 7b-8b).

On September 20, 1963, the Board issued a decision and direction of election (J.A. 14a) directing the election to be held for the multi-employer unit composed of all persons and firms who were members of, or associated with, Sewanee including Products, Consolidated and Grundy. The election was held on October 15, 1963 (J.A. 22a, 24a; RII. GCX 1-A). At the time of the election only 12 of the original 41 members or associates of Sewanee were either engaging in business or had any intention to remain in business (J.A. 24a; RII. GCX 1-A). All ballots of employees of the other members of Sewanee who had ceased operations were

challenged. The Board ordered a hearing to resolve the issues raised by the challenged ballots (J.A. 24a, 69a; RII. GCX 1-A) and broadened the scope of the hearing to include questions of the continued existence of the unit. Prior to said hearing, on June 8, 1954, Sewanee dissolved itself and surrendered its corporate charter, and all formal and informal activities of the association ceased as of that date (RII. Tr. 116).

After hearings, the trial examiner recommended that the Board certify the UMW as the representative of all production and maintenance employees of coal mining operators who were formerly members of Sewanee, including those who are not presently operating but who should resume the business of operating the coal mines at the end of the strike or before the conclusion of the strike (J.A. 51a). The trial examiner also concluded that Grundy and Consolidated were members of the association and would be bound by such certification.

On May 17, 1965, the Board issued a decision (J.A. 53a) adopting the findings, conclusions and recommendations of the trial examiner. On June 7, 1965, the Regional Director for the Tenth Region issued a formal certification of the UMW (J.A.55a).

THE ALLEGED UNFAIR LABOR PRACTICE

On June 17, 1965, the UMW sent a copy of a form letter to all respondents including Products and Cardell Coal Company addressed to William A. Ables, Esq., as counsel and secretary of Sewanee requesting a meeting

for the alleged purpose of entering into the negotiation of a collective bargaining agreement between Sewanee and the UMW. Subsequently, on July 19, 1965, the UMW sent a second form letter again requesting a meeting. On November 1, 1965, the UMW filed unfair labor practice charges alleging a refusal to bargain. These charges were not served on all of the alleged members of Sewanee. An amended charge was filed on March 22, 1966 and served on March 28, 1966 upon all respondents including Products and Cardell Coal Company (J.A. 76a, 77a).

Concerning the charges relating to the Southern Labor Union contract, it is undisputed that H. Willis Flynn was the sole operator of Willis Flynn Coal Company, a member of Sewanee (J.A. 96a). In December, 1963, Flynn incorporated the Sycamore Coal Company. Thereafter, Sycamore, under the name and style Poplar, began to operate and mine an area involved in this matter (J.A. 96a). On or about July 16, 1964, Sycamore, under the style of Poplar, recognized and executed a contract covering its employees at this mine with the Southern Labor Union (J.A. 96a). The charges were filed against Sycamore in July of 1965 and served on July 9, 1965, almost a full year from the date of the signing of the contract between Sycamore and the Southern Labor Union (J.A. 96a).

THE ANTI-TRUST SUITS

While they do not bear directly on the limited questions before the Court in considering petitioner's request for the issuance of a Writ of Certiorari, the anti-

trust suits filed by certain of the respondents against petitioner are part and parcel of the long history of strife and conflict in southeast Tennessee. The case bearing most directly on matters here under consideration is Tennessee Consolidated Coal Company v. United Mine Workers of America, 416 F. 2d 1192, a 1969 decision of the Sixth Circuit, certiorari denied by this Court on March 1, 1970, docket number 1163, October Term, 1969, affirming a 1967 decision from the Eastern District of Tennessee, Southern Division, awarding damages in the amount of 1.8 million dollars for anti-trust violations by the UMW against the plaintiffs. Briefly, the defendants were found guilty of violating Sections 1 and 2 of the Sherman Act by requiring all coal companies whose employees it represented to sign the NBCWA, a contract previously negotiated by the UMW and the BCOA, the BCOA being the other party to the conspiracy

THE SIXTH CIRCUIT'S OPINION

On March 5, 1970, the United States Court of Appeals for the Sixth Circuit rendered a decision denying enforcement of the Board's order. The Court held in part:

> We are persuaded that the events before and after the election of October 15, 1963, destroyed the consen(s)uality needed to justify the creation and, in all events, the continuation of a multi-employer unit. The abortive effort of the Sewanee Association to come to agreement with UMW before the commencement of the strike, called by the latter, did not

foreclose withdrawal, from whatever multi-employer unit may have once existed under the unusual circumstances here present. (Emphasis supplied)

We are also of the view that in all events by the time the certification of the UMW as the exclusive bargaining agent of Tennessee Products and the other respondents was made on June 7, 1965, there was not in existence a legitimate identifiable multi-employer unit which could be required to bargain with the UMW...

The charge of violation of Section 8(a) (1) and (2) was not made until July 1, 1965 almost a year after the accused contract or contracts of July 16, 1964. If there was a violation, that is the date it occurred... We therefore hold that the finding of a violation of Section 8 (a) (1) (2) by Sycamore-Poplar was invalid. Tennessee Products and Chemical Corporation, et al v. NLRB 423 F 2d 169, 179-180

REASONS FOR DENIAL OF THE PETITION

I.

THE SIXTH CIRCUIT DID NOT ERR IN HOLDING THAT UNDER UNUSUAL CIRCUMSTANCES EMPLOYERS COULD WITHDRAW FROM A MULTI-EMPLOYER BARGAINING UNIT WITHOUT THE CONSENT OF THE UNION.

At the outset, it would be instructive to consider a brief history of the evolution of the unusual circumstances rule relied upon upon by the Sixth Circuit in its decision in this case.

The source of the rule apparently is a 1958 Board decision, Retail Associates, Inc., 120 NLRB 388. In that opinion, the Board held at page 395:

> Where actual bargaining negotiations based on the existing multi-employer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances. (Emphasis supplied).

The next major decision in the development of this rule and the one upon which the UMW relies in its petition for certiorari is NLRB v. Sheridan Creations, Inc., 357 F. 2d 245 (1966), a Second Circuit opinion written by Justice Smith, concurred in by District Judge Levet and dissented in by Chief Justice Lumbard. In that case, the Court stated the rule as follows:

> Withdrawal should be restricted to the period before negotiations to assure that it is not used as a bargaining lever. Since this is the purpose of the rule, it is used as an alternative to an inquiry into good faith. Ibid; Page 248.

The Court in Sheridan held that despite the apparent good faith of the employer, withdrawal after bargaining had begun was improper.

Next comes a 1966 opinion of the Sixth Circuit, Universal Insulation Corp. v. NLRB, 361 F. 2d 406. In that case the employer was held to be bound by a contract

which was negotiated by the remaining members of a multi-employer bargaining unit after that employer had withdrawn from the unit. The employer had threatened withdrawal if a new contract had a wage increase in it. The Court in that case relied upon the Sheridan opinion.

Also decided in 1966 was Tenth Circuit case, NLRB v. Tulsa Sheet Metal Works, Inc., 367 F 2d 55. The Tenth Circuit there stated the rule to be:

> Although participation in multi-employer bargaining is voluntary, the Board has repeatedly held that withdrawal therefrom can be accomplished only at an appropriate time and that in the absence of union consent or unusual circumstances, withdrawal is untimely if attempted after the commencement of negotiations. (Citing cases including Sheridan). (Emphasis supplied) Ibid; Page 57.

In Tulsa Sheet Metal, the Court infers that an absolute impasse in bargaining could be such unusual circumstances as contemplated by the rule:

> Respondent asserts that its withdrawal was rendered permissible due to existing special circumstances. It is contended that the withdrawal was justified by the existence of an impasse in bargaining. This contention, however, finds no support in the record, for while substantial disagreement existed on May 31 (respondent withdrew June 3) the parties neverthe-

less contemplated and arranged for additional bargaining sessions after the expiration of the existing contract, and these meetings ultimately produced an agreement. (Interim agreements were made with the remaining members of the unit and ultimately, on June 21, a new contract was negotiated). This indicates an expectation that negotiations would continue to a successful conclusion, and it is apparent that there was no impasse. Ibid; Page 58.

The clear implication from the foregoing is that had the Court found that there was an impasse in the negotiations, the employers contention that withdrawal was permissible because of the special circumstances would have been valid.

The next case is NLRB v. Spun-Jee Corporation, 385 F. 2d 379, a 1967 decision of the Second Circuit written by Justice Smith and concurred in by Chief Justice Lumbard and Justice Waterman. In that case the Court reviewed the development of the rule with regard to withdrawal from a multi-employer bargaining unit:

The Board in Sheridan, 148 NLRB 1503, relied on Kroger, 148 NLRB 569. The rule (no withdrawal from multi-employer unit once bargaining negotiations have begun) is said, however, to have originated in Retail Associates, where the rule is stated with an additional caveat ("absent unusual circumstances"). The Tenth Cir-

cuit in Tulsa Sheet Metal Works, supra, while citing Sheridan, also inserts this cautionary phrase although no such circumstances were there found. Since neither in Sheridan nor Kroger were there facts which required consideration under such a vaveat, its omission is not necessarily significant of its abandonment. In the case at bar there are the circumstances that the attempted withdrawal followed upon the employer's decision for legitimate economic reasons to close down one complete division of his business and contract out that work. Spun-Jee, Op. cit. Page 382. (Emphasis supplied)

The Court went on to remand the case to the Board to consider whethere there were unusual circumstances such as to permit withdrawal. Thus, the Second Circuit which wrote the Sheridan opinion which is the source of the per se rule relied upon by the Board in the present case made clear that it did not intend to enunciate a per se rule in the Sheridan case and held only that under the facts of that case, withdrawal was not proper.

Finally, we come to the present case, reported at 423 F. 2d 169 (1970). The Sixth

Circuit held that the Board's reliance upon a per se rule[2] was improper and that the unusual circumstances and:

> ...events before and after the election of October 15, 1963, destroyed the consen(s)-uality needed to justify the creation and, in all events, the continuation of a multi-employer unit... (and) that in all events by the time the certification of the UMW as the exclusive bargaining agent of Tennessee Products and the other respondents was made on June 7, 1965, there was not in existence a legitimately identifiable multi-employer unit which could be required to bargain with the UMW. 423 F.2d 169, 179.

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[2]"The question then is whether these respondents may avoid that obligation by their unilateral act in dissolving Sewanee after the commencement of collective bargaining. It is plain that they may not... the rule and reason for it have been quite recently explicated by the Court of Appeals for the Second Circuit in NLRB v. Sheridan Creations, Inc., 357 F. 2d 245 (1966) where the Court stated at pp. 247-248: '...(T)he potential for disruption is sufficient to justify the Board in adopting a uniform rule for all cases that withdrawal is not timely once bargaining has begun.'" See Decision of the Trial Examiner as reported in Appendix B, Petitioner's Brief, pp. A-64-65.

In short, the Sixth Circuit held in the present case that the Board applied an improper legal standard by applying a per se rule in reaching its determination that an employer may not withdraw from a multi-employer bargaining unit once negotiations have begun, rather than applying the proper rule - that such withdrawal may be appropriate under unusual circumstances. The Board apparently recognized its error here and did not seek a Writ of Certiorari.

II

THE SIXTH CIRCUIT DID NOT ERR WHEN IT HELD THAT WHERE THE NATIONAL LABOR RELATIONS BOARD HAD ENUNCIATED A PER SE RULE AS TO WITHDRAWAL OF EMPLOYERS FROM A MULTI-EMPLOYER BARGAINING UNIT AFTER THE START OF NEGOTIATIONS, THE BOARD EXCEEDED ITS STATUTORY AUTHORITY AND ITS DECISION BASED UPON SUCH A RULE SO ARBITRARY AS TO REQUIRE THE APPELLATE COURT TO APPLY THE PROPER LEGAL STANDARD.

The UMW has taken the position that the Sixth Circuit exceeded the limits of judicial review by considering the merits of the appropriateness of the multi-employer unit created by the Board. However, this analysis fails to consider that the Board applied a totally improper standard in arriving at its decision.

As has been seen in Section 1, the Board took the position that once negotiations had begun, under no circumstances could withdrawal be permitted. The Board relied

upon the Sheridan case and the logic of that opinion that:

> ...To permit withdrawal after negotiations commence might well lead to a breakdown of the unit. Withdrawal should be restricted to the period before negotiations to assure that it is not used as a bargaining lever. Sheridan, Page 247-248, 357 F. 2d

The purpose of the NLRB is to "effectuate the policies of the (National Labor Relations) Act." 473 F. 2d 175. Clearly, one of the primary means of achieving this objective is the encouraging of the collective bargaining process. However, the per se rule relied upon by the Board and urged here by the UMW does not satisfy this underlying philosophy of the National Labor Relations Act. Under certain unusual circumstances, such as those found in the present case by the Sixth Circuit, the per se rule not only fails to encourage negotiations, but acts in the opposite direction and forces a stalemate. The Sixth Circuit reviewed at great length the long history of labor strife in the southeast Tennessee coal fields. Based upon this history, the Court determined, rightfully so, that the continued existence of an artificial unit as required by the Board, rather than effectuating the policies of the Act, inhibited these policies. The present case clearly represents just those sort of circumstances envisioned by the Tenth Circuit in Tulsa Sheet Metal Works where negotiations had completely broken down and continued bargaining on a multi-employer basis would

serve no purpose other than to prolong the impasse and force further polarization.

This is not a case in which the Sixth Circuit has substituted its own judgment for the factual findings of the Board. Rather, it is a recognition by the Court that the unreasonableness and arbitrariness exhibited by the Board in applying a per se rule despite the unusual circumstances outlined at length in the Court's opinion[3] constituted a failure on the part of the Board to effectuate the policies of the National Labor Relations Act. The Board itself clearly recognized that its objective is to effectuate the policies of the Act as shown by the order of the Trial Examiner recited in part by the Sixth Circuit at Page 175 of its opinion. The Board recognized its error in applying the per se rule to the circumstances here present, accepted the decision of the Sixth Circuit, and did not seek certiorari.

Parenthetically, an additional element considered by the Sixth Circuit and not mentioned by the UMW is the Court's holding with respect to the membership of Grundy Mining Company in the unit:

> Furthermore, it is doubtful that Grundy Mining ever became a member of the multi-employer group. Its membership in Sewanee was conditioned upon a choice by its employees of the UMW as their bar-

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[3]See 423 F. 2d 170-177

gaining agent. Such condition was never, under our view, fulfilled. Additionally, the request by the Southern Labor Union for a separate election for the Grundy employees made clear that such employees did not intend to be part of a multi-employer unit. In NLRB v. Local 210 Internat'l Bhd. of Teamsters, 330 F. 2d 46, 12 A.L.R. 3d 800 (2nd Cir. 1964), the Court said: "One basic test is whether the multi-employer unit was created with the approval, express or implied, of the employees in each of the constituent single-employer units." 330 F. 2d at 47 (Emphasis supplied) 423 F. 2d 178.

The Court went on to quote a portion of the dissent from the Board's decision by Board Member Boyd Leedom:

> I construe Grundy's currently qualified application for membership in Sewanee as conditioned upon separate certification of a union as the majority representative of Grundy's employees. I would, therefore, direct a self determination election among Grundy's employees. If they select the same bargaining representative chosen by a majority of the employees in the multi-employer unit, I would approve them in that unit. On the other hand, in the event that Grundy's employees select a different representative, or no representative, they would be excluded from the multi-employer unit and either constitute a separate appropriate unit, or be unrepresented.

The Sixth Circuit finds that on two counts - the condition placed upon its members by its management representatives at the bargaining sessions that it would be a member only after its employees chose the UMW as its bargaining agent, and that the Grundy employees themselves clearly indicated that they did not wish to be represented by the UMW - Grundy was not a member of the unit.[4]

The UMW apparently concedes this point as it does not address itself to this issue at

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[4] It should be noted here that Consolidated and its wholly owned subsidiary, Grundy, were the dominant interests in the area, and at the present time are the only undertakings presently in operation. Thus, without Grundy, Consolidated and Products, the unit becomes virtually meaningless. The Trial Examiner's opinion as set out at Page A-55 of Respondents' Brief says in part: "While Consolidated was not named in the list attached to the petition in the representation proceedings, it owns and controls Grundy, and the record shows that Consolidated's application for membership, like that of Grundy and Products, was contingent only upon certification of UMW by the Board, which contingency, as the Board noted in its original decision and direction of election, has been fulfilled." The Sixth Circuit was of the opinion that this was not the contingency, and that the actual contingency, selection of the UMW by the Grundy employees, had not been fulfilled.

all. Therefore, regardless of the appropriateness of the unit as to the other respondents, as to Grundy and Consolidated the holding of the Sixth Circuit in accordance with the dissent of the Board Member Leedom clearly precludes their forced membership in the unit.

III

THE SIXTH CIRCUIT PROPERLY FOUND THAT THE ALLEGED VIOLATIONS OF SECTION 8(a) (1) and (2) OF THE ACT WERE BARRED BY THE SIX MONTH STATUTE OF LIMITATIONS OF SECTION 10(b) OF THE NATIONAL LABOR RELATIONS ACT.

As the Sixth Circuit points out in its opinion on pp. 179-180, the alleged violation as to Sycamore and Poplar occurred on July 16, 1964, the time of the execution of the contracts which contracts form the basis for the alleged violation. The charges were not filed until July 1, 1965, almost one full year after the alleged violation. Without question, the six months limitations period of Section 10(b) of the Act was not met, and, therefore, the finding of a violation in this respect was invalid. The UMW is completely silent on this issue and directs no portion of its argument to this question, again apparently conceding the validity of the Court's holding.

CONCLUSION

As has been seen, the Court corrected the error of the Board, applied the proper rules to the circumstances of the case and arrived at the only reasonable decision under these unusual circumstances. Respondents respectfully request that the petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

[fol. 1] UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD, TENTH REGION

SEWANEE COAL OPERATORS' ASSOCIATION, INC. Employer and UNITED MINE WORKERS OF AMERICA Petitioner	CASE NO. 10-RC-5497
GRUNDY MINING COMPANY Employer and LOCAL NO. 139, SOUTHERN LABOR UNION Petitioner	CASE NO. 10-RC-5593
M. A. PAYNE, INC. Employer and LOCAL NO. 139, SOUTHERN LABOR UNION Petitioner	CASE NO. 10-RC-5604
STEPHENSON BROS. COAL CO., INC. Employer and LOCAL NO. 139, SOUTHERN LABOR UNION Petitioner	CASE NO. 10-RC-5605

Appendix A

REPORT ON OBJECTIONS AND CHALLENGED BALLOTS

Pursuant to the Board's Decision and Direction of Election issued on September 20, 1963, an election by secret ballot was conducted on October 15, 1963, among the employees in the appropriate unit to determine whether they desired to be represented, for collective bargaining purposes, by United Mine Workers of America, or by Local No. 139, Southern Labor Union, or by [fol. 2] neither.[1] Upon conclusion of the balloting, the parties were furnished a tally of ballots which showed that of approximately 660 eligible voters, 108 cast valid votes for UMW, 50 cast valid votes for SLU, none cast valid votes against the participating labor organizations, none cast void ballots, and 421 cast challenged ballots. Thus, the challenged ballots are sufficient in number to affect the results of the election.

On October 21, 1963, Grundy and SLU filed timely objections to the election.[2] UMW contends that neither Grundy nor SLU complied with the Board's Rules and Regulations with respect to proper service of their respective objections. This contention is discussed below.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation has been conducted regard-

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[1]The parties are hereinafter referred to as follows: Sewanee Coal Operators' Association, Inc. as Sewanee; Grundy Mining Company as Grundy; M. A. Payne, Inc. as Payne; Stephenson Bros. Coal Co., Inc. as Stephenson; United Mine Workers of America as UMW; and, Local No. 139, Southern Labor Union as SLU.

[2]The petitions in the above-captioned cases were filed on the following dates: Case No. 10-RC-5497 on February 25, 1963. Case No. 10-RC-5593 on May 23, 1963. Case No. 10-RC-5604 on June 6, 1963. Case No. 10-RC-5605 on June 6, 1963. These cases were consolidated by order of the undersigned issued on June 12, 1963.

ing the sufficiency of service of the objections and the issues raised by the objections and challenged ballots.[3] The undersigned, having considered the results thereof, makes the following findings and recommendations to the Board:

Service of Objections

Grundy's certificate of service of the objections, signed by its attorney, Judson Harwood, reads as follows:

> "I hereby certify that a copy of the foregoing objections have been mailed to E. H. Rayson, Attorney for U.M.W., Burwell Building, Knoxville, Tennessee and Ted Wilson, Attorney for Southern Labor Union, Oneida, Tennessee and William Ables, Attorney for Sewanee Coal Operator's Association, South Pittsburg, Tennessee, this 18th day of October, 1963."

SLU's certificate of service of the objections, signed by its attorney, Ted Q. Wilson, reads as follows:

[fol. 3] "I hereby certify that a true copy of the foregoing "Objections to Election" has been served upon William J. Turnblazer, president, District 19, United Mine Workers of America, Middlesboro, Kentucky; and upon United Mine Workers of America, 900 Fifteenth St., N.W., Washington, D.C.; and upon E. H. Rayson, Attorney for United Mine Workers, Burwell Building, Knoxville, Tennessee; and upon Grundy Mining Company, Tracy City, Tennessee; and upon Judson Harwood, Nashville Bank & Trust Building, Nashville 3,

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[3] By letter dated October 25, 1963, the parties were requested to submit a statement setting forth their contentions with respect to each allegation of the objections and to each challenged ballot together with any available evidence in support thereof.

Tennessee, by placing said copies in the United States mail, registered return receipt requested. This the 19th day of October, 1963."[4]

UMW contends that the Grundy objections were served upon the attorneys for UMW, SLU and Sewanee but were not served upon UMW, SLU, Sewanee, Payne or Stephenson. UMW further contends that the SLU objections, according to the certificate of service, were not served upon Sewanee, Payne or Stephenson.[5]

It is undisputed that copies of the objections were immediately served upon the attorneys of record of all parties to the proceeding. These same attorneys acted as agents of and represented the parties at the hearing and in unfair labor practice cases arising earlier this year. Under these circumstances, the undersigned is of the opinion that Grundy and SLU made adequate service of their objections.

The Objections

SLU Objection 1

An atmosphere of confusion and fear was willfully and deliberately created prior to the election and on the day of and during the election by responsible persons and by members of and workers for United Mine Workers of America. Prior to the election, a reign of terror was instituted in the area where those persons voting in the election lived. Threats of physical violence and reprisal were made by United Mine Workers

[4] Although SLU failed to show in its certificate that service of the objections was made upon Sewanee, SLU submitted during the investigation a U. S. Post Office return receipt dated October 21, 1963, showing that service was made upon William Ables, attorney for Sewanee.

[5] Payne and Stephenson are members of the Sewanee Coal Operators' Association, Inc.

members and retired United Mine Worker members against eligible voters.

Because of these threats and the immediate past history in the area which includes three killings, numerous dynamitings, shootings, beatings and picket line violence, as well as mob action against Southern Labor Union, Local No. 139 and its membership at
[fol. 4] Dunlap, Tennessee, many of the employees who were eligible to vote were afraid to go to the polls through the milling mass of United Mine Workers members and sympathizers. Out of the 305 employees listed by the Employer Association as eligible voters, only some 200 appeared and cast ballots. Thus, one-third of the eligible voters were deprived of the right to vote by fear. Those who did vote were unable to make a free choice in the atmosphere which prevailed, as is guaranteed under the law.

By massing persons who were ineligible to vote in the entrance to the polls and having some of them vote challenged ballots, the United Mine Workers managed to prolong the election beyond its appointed hours and until after dark had descended. In the dark of night, several eligible employees refused to even try to vote for fear of "Getting a knife in the ribs while we were trying to vote."

SLU Objection 3

The United Mine Workers of America and its supporters, members and responsible officers remained in and electioneered in the area immediately adjacent to the polls during the time the election was being held. United Mine Workers of America election workers, wearing placards on their backs saying "Vote for United

Mine Workers and be able to get a pension", circulated through the voting line, electioneering with the voters during the time the election was being held.

Grundy Objection 1

The Regional Director, after repeated requests, refused to permit the employees of Grundy Mining Company to vote at their place of work, which is customary in election cases. The Regional Director and his representatives were informed, that due to the fact there had been three murders and numerous other shootings growing out of the repeated efforts of Grundy employees to work in spite of a U.M.W. picket line, that many employees would be fearful of their personal safety unless they were permitted to vote at their place of work. Some 40 odd employees of Grundy Mining Company did not go to Jasper to vote or did not attempt to vote after getting there because of the coercive mob condition which existed at the polls.

Grundy, therefore, charges that a fair and full election was not held and all of the qualified vote who are employees of Grundy Mining Company were not afforded laboratory conditions in which to cast their vote.

Grundy Objection 2

Grundy also excepts to the fact that the voting was not completed until more than an hour and a half after the time prescribed in the Board's order for voting and that on this day it was dark in Jasper for more than an hour prior to the completion of the voting and this condition made the fearfulness of Grundy em-

[fol. 5] ployees even more acute.

Appendix A

Grundy Objection 3

Grundy also excepts to the conduct on the behalf of the United Mine Workers, that the said U.M.W. caused a great horde of people to congregate at or near the polling place and that the U.M.W. had solicited said persons under the pretense of "lending moral support." In view of the background of shootings and dynamitings which have occurred repeatedly in this city, this situation alone created a coercive atmosphere and certainly was not conducive to a laboratory condition for holding of said election.

Grundy further charges that the U.M.W. willingly and deliberately caused many people to offer to vote whom the U.M.W. knew had no possible qualification under the Board's order and this was intended to and did create a coercive atmosphere.

The investigation disclosed that on December 26, 1962, UMW through its District 19, Local 7224, Pocket Local 7083 and Palmer Local 5881, commenced an economic strike against Grundy. Thereafter, the strike was extended to the other Employers involved in this proceeding. Upon an amended charge (Case No. 10-CB-1402) filed May 29, 1963, by SLU, the undersigned issued a complaint against UMW Local 7224 alleging that on or about April 24, 1963, the Respondent instigated and participated in mob threats and violence against employees of Grundy to prevent them from meeting to organize, form, join, and assist SLU in violation of Section 8 (b) (1) (A) of the Act. On November 1, 1963, the Trial Examiner issued his decision finding a violation of Section 8 (b) (1) (A) as alleged in the complaint. Upon another amended charge (Case No. 10-CB-1401) filed May 29, 1963, by SLU, the

undersigned issued a complaint against UMW Local 7083 alleging that on or about May 7, 1963, the Respondent prevented employees of Grundy from reporting to work at its mine site at Tracy City, Tennessee, by massing at the access thereto and by committing and threatening to commit physical violence upon Grundy employees, in violation of Section 8 (b) (1) (A) of the Act. On October 25, 1963, the Trial Examiner issued his decision finding a violation of Section 8 (b) (1) (A) as alleged in the complaint.

In the opinion of the undersigned, the violations of Section 8 (b) (1) (A) of the Act which occurred since the filing of the petition in Case No. 10-RC-5497, [fol. 6] found by the Trial Examiner in Cases Nos. 10-CB-1401 and 10-CB-1402 constitute, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in the election.[6] Accordingly, the undersigned finds merit in those portions of SLU Objection 1 and Grundy Objection 1 relating to pre-election violence.

After the Board issued its Decision and Direction of Election, the undersigned decided to conduct the election at one central location in view of the fact that all the Employers were located in and around Marion County, Tennessee and because of the large number of employees on strike or in layoff status. On October 2, 1963, a Board agent conducted a conference with the parties for the purpose of making election arrangements including suggestions regarding the location of the polls. William Ables, Sewanee's attorney who is also an attorney for Grundy,[7] suggested Dunlap or Jasper, Tennessee as the

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[6] Dal-Tex Optical Company, Inc., 137 NLRB 1782; Playskool Manufacturing Company, 140 NLRB 1417; National Gypsum Company, 133 NLRB 1492.

[7] Grundy's other attorney, Judson Harwood, had previously informed the Regional Office that Ables would handle the election arrangements.

most appropriate location. UMW contended that the election should be conducted at Whitwell or Palmer, Tennessee. The undersigned, upon being apprised of these contentions, decided to conduct the election at Whitwell since that town appeared to be centrally located with respect to the eligible voters. Thereafter, the attorneys for Sewanee and Grundy objected to Whitwell on the grounds that the violence referred to above occurred in that area and would preclude a fair election. They also renewed their request that the election be conducted at Jasper where adequate law enforcement would be available in the event of any misconduct during the election.

The undersigned reconsidered the decision regarding the location of the polling place and decided that while no violence or other misconduct was anticipated, the election should be held at Jasper where the likelihood of such conduct would be minimized. Consequently, the election was conducted in a vacant store on the courthouse square at Jasper, Tennessee.

[fol. 7] An analysis of the eligibility list furnished by the Employers reveals that of approximately 280 employees listed, 199 voted in the election. With respect to Grundy employees, 108 of 155 employees shown on the list voted in the election. There has been no showing that Grundy was in fact prejudiced or that the secrecy of the election was impaired because of the location of the polling place. Moreover, the election was conducted at the location requested by the Employers. The Board has frequently held that the Regional Director has broad discretion in making arrangements with respect to conduct of election.[8] Since no abuse of this discretion has been shown, the undersigned finds Grundy's allegation regarding the location of the polls to be without merit.

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[8] Milham Products Co., Inc., 114 NLRB 1544.

UMW denied that it massed ineligible voters at the polls or caused a "great horde of people to congregate at or near the polling place," but admitted that it urged all employees of the Employers involved to vote. UMW, in support of this conduct, contends that the cessation of operations by some of the Employers prior to the election was temporary and thus, the employees of such Employers are eligible voters. According to the investigation, a large number of persons including strikers, nonstrikers, replacements and others were congregated on the sidewalk and street immediately outside the polling place before and during the polling period. This crown has been estimated to number from 200 to 2000 at various times.[9] The line of voters, from 4 to 6 deep, extended from the entrance to the polls down the sidewalk for a block or more. While the polls were open, several unidentified persons circulated about the voting line outside the polling place wearing placards reading "Vote for United Mine Workers and be able to get a pension." UMW denied that it furnished or authorized the wearing of such placards. UMW admitted that its representatives remained across the street from the voting place while the polls were open and answered inquiries by some employees regarding the correct name of their employers but denied that it engaged in any electioneering. Before opening the polls, the Board agent in charge of the election did not specify a no electioneering area but cautioned the representatives of the parties not to enter the polling place during the election. [fol. 8]

In the opinion of the undersigned, Grundy's and SLU's allegation that the UMW interferred with the election by causing ineligible employees to vote is without merit. The board has held that if, as alleged, a labor

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[9] The investigation also revealed that criminal court was in session on the date of the election.

organization caused persons to vote who were known by it to be ineligible, the mere fact that a disproportionate number of ineligible persons voted under challenge in the presence of other voters does not warrant the inference that such other voters were coerced to vote for such labor organization.[10]

During the election, although four Board agents were present and were assisted by two U. S. Marshals, the voting progress was retarded because of the large number of challenged ballots cast. Consequently, an undisclosed number of voters were in line at 5:00 P.M., the scheduled closing time. At that time, a Board agent was stationed at the end of the line and the voters then in line were given an opportunity to cast their ballots. Since darkness had ensued, lights were provided for the polling place.

The undersigned is of the opinion that Board agents acted properly by extending the voting hours to permit persons in line to vote. This action prevented the disenfranchisement of the voters who had presented themselves timely and through no fault of their own could not cast their ballots within the scheduled time. The unsupported contentions that this condition affected the results of the election appear to be mere suppositions. Accordingly, Grundy Objection 2 and that portion of SLU Objection 1 relative to the extension of the election hours are without merit.

There remains for consideration the allegations regarding the conditions existing at the entrance of the polling place during the election. There has been no allegation and the investigation did not show that any improper conduct occurred inside the building where the employees

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[10] Minerals and Metals Corporation, 110 NLRB 710; The Hitchcock Corporation, 110 NLRB 477.

voted. However, in the opinion of the undersigned, the pictorial evidence submitted during the investigation depicting the crowd massed at the entrance to the polling place and the placard electioneering by unidentified persons in behalf of UMW in the area immediately outside the polls and in close proximity to the voters waiting in line coupled with the background of violence hereinbefore described was sufficient to create an atmosphere of fear and confusion at the polls which raises substantial and material issues regarding the results of the election.[11]

[fol. 9]

In summation, the undersigned is of the opinion that the portions of Grundy Objection 1 and SLU Objection 1 relating to pre-election violence, and Grundy Objection 3 and SLU Objection 3 relative to electioneering near the polls by unidentified persons and the crowd congregated at the entrance to the polling place raise material and substantial issues with respect to the results of the election. All other allegations of SLU Objections 1 and 3 and Grundy Objections 1, 2 and 3 are without merit.

SLU Objection 2

The United Mine Workers of America, through its responsible representatives and membership, told employees that once the United Mine Workers of America had won this election all operators would have to sign the nation wide contract which would result in an immediate increase in wages and fringe benefits to all employees.

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[11] It is not material that the investigation did not reveal that the UMW was responsible for the massing of the individuals and the placard electioneering. "The important fact is that such conditions existed and that a free election was thereby rendered impossible." Diamond State Poultry Co., Inc., 107 NLRB 3, 6.

SLU did not submit any evidence in support of this allegation and none was adduced during the investigation. UMW denied that such statement was made. Therefore, SLU Objection 2 is without merit.

Grundy Objection 4

Grundy Mining Company excepts to the holding of an election on a multi-employer unit on the grounds that the statute does not so authorize. The only employees in the entire area who have worked in more than a year are the employees of Grundy Mining Company, which employees have, to the best information of Grundy, voluntarily affiliated with the Southern Labor Union, and to permit former employees of other employers to prevent an employee of Grundy to have a qualified bargaining agent of their own choosing is contrary to the statute, purpose and intent thereof.

This allegation constitutes an objection to the Board's finding of the appropriate unit in its Decision and Direction of election. It is well established that the Board [fol. 10] will not consider objections to an election which raise the propriety of the voting groups in which the elections were directed, for the reason that such questions have already been fully considered and litigated in the representation hearing.[12] Therefore, the undersigned finds no merit to Grundy Objection 4.

Challenged Ballots

On the date of the election, an economic strike which commenced December 26, 1962, was still in progress.

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[12] William R. Whittaker Co., Ltd., 94 NLRB 1151; M & S Morenci Corporation, 100 NLRB 1114; United States Gypsum Company, 107 NLRB 122.

Appendix A

As a result of the strike, certain members of Sewanee ceased operations either temporarily or permanently, whereas others continued operations. As a result, the persons who voted in the election consisted of working employees, strikers, replacements and laid off employees. During the election, 421 challenged ballots were cast. A complete list of the challenges is attached hereto marked "Appendix A." The payroll eligibility periods were December 21, 1962 for Sewanee and Stephenson; September 13, 1963 for Grundy; and February 23, 1963 for Payne. Of the total number of challenges, UMW challenged 42 persons (all on the Grundy eligibility list) as being either guards or supervisors. The Board agent challenged 379. persons whose names were not on the eligibility list furnished by the Employer. The latter group consists of alleged strikers and laid off employees.

Sewanee contends that only the employees of the following Employers are eligible voters since these Employers are in business and intend to remain in business:

Thomas Coal Company
M. A. Payne, Inc.
O. L. Ellis Coal Company, Inc.
Tracy City Coal Company, Inc.
Cates Coal Company
Cunningham Coal Company
Good Springs Coal Company, Inc.
Ninth West Coal Company, Inc.
Martin Coal Company
J. W. Sanders Coal Company, Inc.
North End Coal Company
Grundy Mining Company

[fol. 11] Appendix A

Sewanee further contends that the employees of the following Employers are not eligible voters since such Employers permanently ceased operations prior to the election:

Willis Flynn Coal Company
Howard Higgins Coal Company
Cordell Coal Company
C. P. Hunziker Coal Company
James Leon Patton Coal Company
J. R. Patton Coal Company
Hubert Fults Coal Company
Clear Creek Coal Company
Stephenson Bros. Coal Co., Inc.
Leon Nunley Coal Company
Frank Hunziker Coal Company
Kelly Creek Coal Company
East Coal Company
Whitwell Mountain Coal Company
Tennessee Products & Chemical Company
Marshall Meeks Coal Company
Tennessee Consolidated Coal Company
Whitwell Coal Company
R & S Coal Company
Hoyt Rogers Coal Company
Basham Coal Company

UMW contends that the employees of all the aforementioned Employers are eligible voters and that the contention that they are no longer in business is made for the purpose of disqualifying voters known to be favorable to the UMW. SLU did not submit any position during the investigation regarding the challenged ballots.

In the opinion of the undersigned, the conflicting contentions with respect to the identify of the Employers who permanently ceased operations prior to the election thus affecting the eligibility of certain employees shown in Appendix A and the status of the persons challenged as being supervisors and guards raise issues which may be best resolved by record testimony at a hearing.

CONCLUSIONS AND RECOMMENDATIONS

For the reasons stated above, the undersigned recommends to the Board that:

(1) Those portions of Grundy objections 1 and 3 and SLU objections 1 and 3 relating to pre-election violence, electioneering by unidentified persons and the crowd congregated at the entrance to the polling place raise material and substantial issues affecting the results of the election and pre-
[fol. 12] vented the exercise of a free choice of the voters in their selection of a bargaining representative. For this reason, the election should be set aside and a new election directed, subsequent to the hearing hereinafter recommended.

(2) Grundy objections 2 and 4 are without merit and should be overruled.

(3) SLU objection 2 is without merit and should be overruled.

(4) A hearing before a Trial Examiner of the Board be directed to resolve the issues raised by the 421 challenged ballots herein.

Issued at Atlanta, Georgia, this 17th day of December, 1963.

Appendix A

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